



MYER FAMILY OFFICE

20 July 2009

Manager
Philanthropy & Exemptions Unit
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email to: ppfreview2008@treasury.gov.au

Dear Sir,

Draft – Private Ancillary Fund Guidelines 2009

We refer to Treasury's Draft Private Ancillary Fund Guidelines 2009 released on 25 June 2009. As you are aware The Myer Family Office has closely monitored Treasury's review of prescribed private funds. We applauded the introduction of PPFs in 2001 as we could see the substantial positive impact that they would have on the philanthropic sector, and ultimately the community sector, and we have created approximately 50 PPFs in conjunction with our clients.

The growth of PPFs has had a significant positive impact on the Australian community. Their introduction has arguably had a greater impact on philanthropy in this country than any other measure in our history.


As part of this review process we lodged submissions on 13 January 2009 and 28 May 2009. The details pertaining to PPFs discussed in our submissions are still relevant. Treasury's November 2008 Discussion effectively suggested eliminating privacy and perpetuity of PPFs, moves that staggered the philanthropic sector as we could see that this would spell the demise of PPFs, ultimately having a significant adverse impact on the community sector. We applaud Treasury for listening to the concerns of the sector and retaining the privacy and perpetuity of PPFs. We also believe that some of the other administrative changes will improve the operational efficiency of PPFs, in particular the abolition of accumulation plans, increasing the appeal of PPFs.

Whilst we appreciate that the Guidelines would be a legislative instrument, we believe the key issues within the Guidelines relating to the privacy of PPFs and the annual distribution rate should be legislated to provide PPF founders and potential founders with greater certainty. This would assist the long term nature of philanthropic funding.

Our specific comments on the draft Guidelines are attached.

If you would like to discuss this submission please contact Peter Winneke on (03) 9207 3065 or Graham Reeve on (03) 9207 7814.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Peter Winneke'.

Peter Winneke
Head of Philanthropic Services

A handwritten signature in blue ink, appearing to read 'Graham Reeve'.

Graham Reeve
Managing Director

PRIVATE ANCILLARY FUND GUIDELINES 2009 (DRAFT)

PART 1 – PRELIMINARY

Name of Guidelines

1. We recommend that PPFs be renamed Private Philanthropic Funds, not Private Ancillary Funds ('PAF'). This not only retains the known acronym, PPF, but also provides a practical name. 'Private Ancillary Fund' has little meaning and the acronym, PAF, will get confused with Public Ancillary Fund (also PAF).

2. to 6.

No specific comments.

PART 2 – RULES FOR ESTABLISHING & MAINTAINING PAFS AS DGRS

Object

7. No specific comments.

General Principles

8. This clause includes the following clause:

"It is a trust that:

- *complies with all relevant laws and obligations; and*
- *is open, transparent and accountable to the public (through the Commissioner)."*

We seek confirmation that this paragraph means that PAFs will be "accountable to the public (through the Commissioner)" via the annual lodgment of the Information Return and that the details of PAF founders (names, addresses etc) will remain private. Privacy is a matter of critical importance to PAF founders and will be necessary to ensure the growth in the establishment of PAFs continues. We also seek assurance that no other measures will be introduced by the Commissioner through regulations.

Purpose & Objects of the Fund

9. No specific comments.
10. To avoid ambiguity we suggest that this clause include a detailed definition of eligible charities that a PAF can make distributions to i.e. tax concession charity ('TCC') and 'item 1' DGR.

Not-for-Profit

11. to 17.

No specific comments.

Liability of Trustee

18. We believe that, “negligence of the trustee, employee, officer or agent” within this clause should be deleted. We are concerned that its inclusion will result in:

- most existing PAF Trust Deeds requiring amendment to comply with the new Guidelines; and
- the position of Responsible Person being significantly less attractive to potential candidates as they would have a higher potential liability than they would in a normal commercial environment.

Minimum Annual Distribution

19. We agree with the 5% annual distribution figure, however, believe that the annual distribution should be 5% of the market value of the fund’s net assets (as at the end of the previous financial year) in order to take into account any financial obligations that the fund has at year end.

In relation to 19.4 to 19.6 we believe it is logical that any penalty benefits the community. Accordingly the penalty should be paid by increasing the PAF’s minimum distribution in the following financial year.

Valuation

20. The market value of the fund’s assets (other than land) should be “valued” at least annually, not “estimated”.

21. to 22

No specific comments.

23. “Income tax return” is used throughout the Guidelines. Obviously PAFs do not lodge income tax returns due to their income tax exempt nature. We suggest the term be replaced by “Information Return”.

Accounts

24. to 25

No specific comments.

Financial Statements

26. In order to increase transparency of related party transactions we recommend a clause 26.4 be inserted:

26.4 All related party transactions must be disclosed in the financial statements.

Audit

27. to 28

No specific comments.

Investment Strategy

29. to 31

No specific comments.

Distribution Strategy

32. and 33.

As the new minimum distribution requirements of a PAF are clearly articulated in section 19 we do not understand the need for this clause and recommend that it be deleted. A revised Information Return could clearly summarise the minimum distribution requirement for the year, how it was calculated, the gifts to the fund and the gifts made by the fund for the year.

34. In our experience PAF's rarely borrow funds, however, for efficient capital management purposes we recommend that this section be deleted. Alternatively a small borrowing limit of (say) 10% of assets be permitted to cover situations of funding distributions when it may be inappropriate or uneconomic to sell assets of the fund.

35. to 36

No specific comments.

37. There are cases where a fund could benefit from acquiring an asset from a founder or associate. Accordingly we recommend that the following be included at the rear of this clause: "...except by way of a commercial transaction."

For clarity we recommend that a definition of "associate" be included in this clause.

38. to 41.

No specific comments.

Uncommercial Transactions and Benefits to Founder/Donor

42. to 43

No specific comments.

Fees and Expenses

44. No specific comments.

Donors

45. to 46

No specific comments.

47. We agree that PAFs are private philanthropic funds and should not solicit gifts from the public; that is the role of public ancillary funds. However, we believe the wording of this draft clause will preclude “Warren Buffett” type gifts to the philanthropic sector. In 2006 Buffet pledged to gift approximately US\$37 billion to the Bill and Melinda Gates Foundation. He chose to do so as he admired the strategic giving approach of the Gates Foundation, an area in which Buffett had limited knowledge. He chose to create efficiencies and reduce duplication by gifting to the Gates Foundation instead of establishing his own foundation. This approach was widely applauded in the philanthropic sector.

We believe the PAF guidelines should provide the opportunities for such gifts to occur in Australia. We recommend that clause 47 be deleted and replaced with the following:

In any financial year, the fund must not accept donations totaling more than 25% (in total) of the market value of its assets (determined at the end of the previous financial year) from entities other than:

- *A founder or trustee of the fund; or*
- *Associates of the founder; or*
- *Employees of the founder.*

The above will allow a “Warren Buffett” type significant gift to a PAF as long as the donor becomes a trustee of the fund. Further, by allowing non founders, associates and employees to gift up to 25% of the value of the prior year corpus it encourages community engagement as well as increasing market efficiencies and minimising duplication.

48. No specific comments.

Compliance with all Relevant Laws

49. to 50

No specific comments.

Winding up or Ceasing to be a Private Ancillary Fund

51. No specific comments.

Converting a Private Ancillary Fund into a Public Ancillary Fund

52. We agree with the inclusion of this clause. We also believe that a sub-fund within a public ancillary fund should be able to be converted to a PAF. This would enable donors to start with a minimal balance, explore their passions within the community and enable them to convert to a PAF when their financial capacity grows. This would provide greater flexibility of giving to donors with changing giving needs, thereby further encouraging giving generally.

PART 3 – TRANSITIONAL RULES FOR FORMER PRESCRIBED PRIVATE FUNDS

Introduction

53. No specific comments.

Distributions

54. We seek clarification that existing PAFs could choose to apply the new distribution guidelines from 1 July 2009 and therefore in 2009/10 distribute a minimum of 5% of the market value of the corpus as at 30 June 2009.

55. No specific comments.

Transitional Distribution Rules

56. No specific comments

Governing Rules Inconsistent with these Guidelines

57. to 59

Whilst we have not sought legal advice on any inconsistencies of the governing rules with these Guidelines, we understand that any requirement to amend existing PPF Trust Deeds may have significant adverse State duty consequences.